IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

FAO (Ord.) No.379 of 2001.

Judgment reserved on 10.8.2007.

Date of decision: 14.9.2007

Shri Kehar Singh …..Defendants-Appellants

-Versus-

Shri Ram Shakti and others ….Plaintiffs-Respondents

Coram:

The Hon'ble Mr.Justice Deepak Gupta, Judge.

Whether approved for reporting? No

For the Appellants: Mr.Bhupinder Gupta, Senior Advocate with Mr.Neeraj Gupta, Advocate.

For Respondents : Mr.Baldev Singh, Advocate.

Deepak Gupta, J.

This appeal is directed against the judgment of the learned District Judge, Una in Civil Appeal No.13 of 1997 decided on 13.9.2001 whereby he has set-aside the judgment and decree dated 26.11.1996 passed by Sub Judge Ist Class (2), Una and has remanded the case back to the learned trial Court for fresh disposal.

The facts of this case again highlight the unhealthy practice being followed by some of the lower appellate Courts of choosing an easy way of remanding a case in total violation of the provisions of Order 41 Rules 23 & 25 of the Code of Civil Procedure.

The brief facts necessary for decision of the case are that the plaintiffs (respondents herein) filed a suit against the defendants

(appellants herein) to the effect that land measuring 1592.62 sq.mts. compromised in khasra Nos.894 and 895 situate in Up Mohal Arya Nagar, Mohal Una as depicted in the copy of missal hakiat for the year 1987-88 is owned and possessed by them.

Ram Ditta, grand father of the plaintiffs had four sons, namely, Girdhari Lal, Bihari Lal, Amar Chand and Uttam Chand. Girdhari Lal had one daughter who was married to Amar Singh father of the defendants. Dev Raj son of Girdhari Lal appointed Amar Singh as his general attorney vide registered power of attorney dated 21st May, 1942. At the said time the land was jointly held. It is alleged that Amar Singh misusing his power of attorney got the revenue record changed. Firstly he was shown as tenant and later his children, that is, the defendants were shown to be tenants on the land in question. The revenue entries in this behalf were entered as "Gair Morusi Bila Lagaan Ba Wajaha Rishtedari". This entry was made in the revenue record vide Fard Badar No.155. The case of the plaintiffs is that this entry is false and their predecessor-in-interest never inducted Amar Singh or the defendants as tenants nor was Amar Singh appointed as their attorney. It is also alleged that Amar Singh on the basis of the aforesaid entries even managed to get the entry of possession recorded in his favour vide order dated 17th November, 1988 passed by the Naib Tehsildar (Settlement). The plaintiffs have alleged that the defendants on the basis of the wrong entries have started interfering in their possession and hence the suit.

The suit was contested by the defendants and it was averred that Amar Singh, their father had been inducted as tenant but no rent was payable in view of the relationship between the parties. It was also

alleged that proprietary rights were later conferred on Amar Singh. It was denied that Dev Raj had appointed Amar Singh as a general attorney. In the alternative it was prayed that the defendants have become owners by way of adverse possession.

On the pleadings of the parties the trial Court framed the following issues:

> "1.Whether the plaintiff is owner in possession of the suit land as alleged?OPP
> 2.Whether the revenue entries contrary to plaintiffs' interest are illegal, null and void as alleged?OPP
> 3.Whether the suit is not competent in the present form as alleged?OPD
> 4.Whether the suit is barred by limitation?OPD.
> 5.Whether the suit is liable to be stayed for want of proper address of defendants as alleged?OPD.
> 6.Whether the defendants have become owner of suit land by adverse possession as alleged?OPD.
> 7.Whether the suit is without any cause of action?OPD.
> 8.Whether the suit is not properly valued for the purposes of court fee?OPD.
> 9.Whether the suit is collusive having been filed with the collusion of Hari Kishan and Dev Raj as alleged?OPD.
> 10.Relief."

Issues No.3,4,5,7,8 and 9 were not pressed by the defendants. The learned trial Court decided issues No.1, 2 and 6 together and issues No.1&2 were decided against the plaintiffs and issue No.6 against the defendants. On the basis of his findings he dismissed the suit.

Aggrieved against the judgment and decree of the learned trial Court the plaintiffs filed an appeal before the learned lower appellate Court. The learned lower appellate Court came to the conclusion that

the trial Court had not framed any issue on the plea of tenancy of Amar Singh as set up by the defendants and he framed the following additional issue:

> "9-A.Whether Amar Singh, father of the defendants/respondents, has been tenant-at-will over the suit land and had become owner thereof by operation of law as alleged?...OPD"

The learned lower appellate Court also held that the learned trial Court had erred in deciding issues 1,2 and 6 by a joint discussion and therefore held that the entire judgment is liable to be set-aside. While doing so the learned appellate Court relied upon a judgment of this Court in Om Parkash and others vs. State of Himachal Pradesh and others, AIR 2001 HP 18.

As far as framing of an additional issue is concerned, I find that in para 4 the plaintiffs had specifically alleged that Amar Singh, father of the defendants had illegally procured the entries of suit land showing the tenancy in his name. It was also alleged that Amar Singh had got the entry of tenancy in his favour wrongly recorded. The defendants in their reply had averred that Amar Singh was inducted tenant by the father of the plaintiffs. It was further prayed that on the basis of this tenancy he had become owner by operation of law. I am of the considered view that no fresh issue arose in this case. Issues 1&2 as framed virtually covered entire dispute between the parties. Issue No.2 related to the correctness of the revenue entries in which Amar Singh was entered as tenant. The parties were well aware that the main dispute is whether Amar Singh had been inducted as a tenant on the suit land or not. The plaintiffs especially were aware of this fact since they

had specifically challenged the revenue entries in which Amar Singh and later on the defendants were shown to be the tenants. Issue No.2 had been specifically framed in this regard. Therefore, in my opinion the learned lower appellate Court gravely erred in framing a fresh issue No.9-A which was substantially covered by issues 1&2 already framed.

I am also of the view that the learned lower appellate Court did not properly frame the issue. In the revenue record for a long period of time Amar Singh and later his sons were shown tenants in possession of the suit land. Presumption of truth is attached to such revenue record. No doubt this presumption is a rebuttable presumption. However, the onus to rebut the presumption lies on the person who alleges that the revenue entries are wrong. Therefore, even if the issue had to be framed the onus was on the plaintiffs to prove that the revenue entries were wrong. This they had already alleged and issue No.2 had been framed in this regard. Issue No.9-A framed by the appellate Court is surplussage and need not be framed.

Coming to the next point regarding joint discussion on issues No.1,2 and 6 I am of the opinion that here again the learned lower appellate Court had totally mis-construed the judgment cited by it. It also appears that the learned lower appellate Court had not carefully read the judgment of the trial Court. No doubt issues No.1,2 and 6 have been discussed under one heading. There was nothing wrong with this because evidence was common with regard to these issues. The issues were inter-linked. Issues 1&6 related to the possession of the parties. Both had to be discussed together. Further, I find that though the learned trial Court had discussed these issues under one heading he has

given clear-cut findings on each issue separately. The discussion on these issues starts from para 7 of the judgment. The learned trial Court has discussed the evidence led by both the parties from paras 7 to 10. In paras 11&12 he has dealt with the arguments of both the counsel. In para 13 he has dealt only with issue No.1 and after discussing the relevant evidence and arguments has decided issue No.1 against the plaintiffs. Thereafter, he proceeded to decide issue No.2 in para 14. This para runs virtually into two pages . In para 15 he had come to the conclusion that it stands proved that the defendants' father was tenant on the suit land and on this basis issue No.2 has been decided against the defendants. Since he has held that the defendants' father was a tenant in the suit land question of adverse possession does not arise and therefore he has decided issue No.6 against the defendants.

The learned lower appellate Court, in my opinion, gravely erred in holding that there was a common discussion. The issues may have been decided under common heading but the learned trial Court had discussed each issue separately and has decided each issue on merits.

This Court has repeatedly been holding that the lower appellate Courts should avoid remanding a case except when necessary. The mere non framing of an issue is not a sufficient ground to remand the case. Non-framing of a proper issue is not fatal to the case especially when the parties are aware about the pleadings and have led evidence. Reference in this behalf is to be made; **Durga Dass vs. Mathu, Latest HLJ 2001 (HP) 859, Nand Lal vs. Sewak and others, Latest HLJ 2005 (HP) 986, Ramesh Chand Soni and another vs. Jodh Singh and**

another, Latest HLJ 2005 (HP) 1054 and Roshan Lal and others vs. Sumati Parkash and others, Latest HLJ 2005 (HP) 1380.

In view of the material discussed above it is clear that in the present case both the parties was aware of what was the dispute between them and the issue framed by the learned lower appellate Court was virtually covered by the issues previously made. Further no ground was made out for remand of the case even on framing of proper issues.

In view of the above discussion the present appeal is allowed. The judgment and order of the learned lower Appellate Court is set-aside. The case is remanded to the learned lower appellate Court who shall register the appeal against its original number. The original suit was filed in the year 1990 and we are in the year 2007, therefore, parties through their counsel are directed to appear before the learned lower appellate Court on 12th October, 2007. The Registry is directed to ensure that the records reach the learned lower appellate Court well before the next date. The learned lower appellate Court is directed to dispose of the matter latest by 31st December, 2007.

Sept. 14, 2007. **(Deepak Gupta),**
PV **Judge**